

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA §
§
v. § Case Number: 4:09-CR-161
§ 4:10CR47
CLOVIS L. PRINCE §

MEMORANDUM OPINION & ORDER

Pending before the Court is Defendant's Motion for Release Under the First Step Act This Emergency Motion for Reduction of Sentence in accordance to Compassionate Release Pursuant to 18 U.S.C. section 3582(c)(1)(A) Resulting Because of the COVID-19 Pandemic (Dkt. 377). Defendant filed a supplement (Dkt. #379). The Government has responded in opposition (Dkt. #382). Defendant filed a reply (Dkt. # 387).¹

The Court, having considered the motion, the response, the record, and the applicable law, finds that the motion must be **DISMISSED for lack of jurisdiction.**

I. BACKGROUND

Defendant was indicted on September 10, 2009, for one count of Bank Fraud and fourteen counts of Money Laundering, in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 1957 in case number 4:09CR161. Defendant was released pending trial. While on pre-trial release, Defendant was alleged to have committed perjury and fraud relating to his bankruptcy proceedings. Defendant was indicted on March 10, 2010, for ten counts of perjury and five counts of Bankruptcy Fraud, in violation of 18 U.S.C. §1621, 18 U.S.C. § 152, and § 157 in case number 4:10CR47. A superseding indictment was filed on July 14, 2010, charging 23 total counts of False Declaration

¹ Defendant has two cases and filed the identical documents in both cases. In 4:10cr47, Defendant's motion for sentence reduction is docket number 275; Defendant's supplement is docket number 277; the Government's response is docket number is docket number 280; and Defendant's reply is docket number 285 .

Before the Court and Bankruptcy Fraud, in violation of 18 U.S.C. §1623(a) and §§ 152, 157 (Dkt. #32). The second indictment triggered a warrant to be issued for violating his pretrial release. When agents went to arrest Defendant for the crimes alleged in the second indictment, Defendant attempted to flee in his vehicle and crashed, later claiming he thought he was being “carjacked.” He was taken to the hospital with minor injuries, where he attempted to escape through a ceiling tile in the bathroom, only to later claim he was attempting suicide because he had just been told he was going blind, didn’t have feeling in his left leg, and was being charged by a “bogus” indictment.

Defendant pleaded not guilty to all charges. The Court ordered the cases consolidated and the parties proceeded to trial on both indictments on November 10, 2010. After an almost four-week trial, Defendant was found guilty by a jury on all counts and eventually sentenced to the maximum term of imprisonment of 30 years’ imprisonment on Count 1 and ten years on each of Counts 2 through 15 in 4:09CR161, and 48 months on each of Counts 1-23 in 4:10CR47, plus 12 months under 18 U.S.C. § 3147 consecutive to the 48 months (Dkt. #313, #214, respectively). The sentence in 4:10CR47 was ordered concurrent to the sentence in 4:09CR161. Defendant was also ordered to pay restitution in the amount of \$13,640,425.56. Defendant has served only ten years of his 30-year sentence and is currently 71 years old.

Defendant seeks release based upon COVID-19 concerns and his other medical conditions. The Government opposes Defendant’s motion

II. DISCUSSION

A judgment of conviction imposing a sentence of imprisonment “constitutes a final judgment and may not be modified by a district court except in limited circumstances.” *Dillon v. United States*, 560 U.S. 817, 824, 130 S. Ct. 2683, 177 L.Ed.2d 271 (2010) (quoting 18 U.S.C. § 3582(b)); *see also* 18 U.S.C. § 3582(c). One such circumstance, invoked by Defendant, arises from

18 U.S.C. § 3582(c)(1)(A)(i), which authorizes a district court to reduce a term of imprisonment when “extraordinary and compelling reasons” for a reduction exist that are “consistent with applicable policy statements issued by the Sentencing Commission,” and other procedural and substantive requirements are met. 18 U.S.C. § 3582(c)(1)(A).

A. Defendant Has Met Section 3582(c)(1)(A)’s Exhaustion Requirement.

Defendant’s compassionate-release motion may be considered only if he first meets section 3582(c)(1)(A)’s exhaustion requirement. The statute provides that a court may not consider any modification to a defendant’s sentence under section 3582(c)(1)(A)(i) unless a motion for such a modification is properly made by the Director of the BOP or by a defendant who has fully exhausted his or her administrative remedies. 18 U.S.C. § 3582(c)(1)(A). The Director of the BOP may request a sentence reduction in court at any time. *Id.* A defendant may also make such a request but only after fully exhausting remedies within the BOP or after 30 days have passed since he or she sought administrative remedies. *Id.*²

Defendant submitted a request regarding his release to his warden on March 30, 2020. Since more than 30 days have passed since Defendant made the request, Defendant has, therefore, met section 3582(c)(1)(A)’s exhaustion requirement.

B. Defendant Has Not Met Section 3582(c)(1)(A)’s Requirements for Sentence Modification.

1. Defendant must meet section 3582(c)(1)(A)’s requirement that “extraordinary and compelling reasons” exist “consistent with applicable policy statements issued by the Sentencing Commission,” warranting a reduction of his sentence.

Under section 3582(c)(1)(A)(i), a district court may grant a sentence reduction if it finds that (1) “extraordinary and compelling reasons warrant such a reduction,” (2) “such a reduction is

² In 2018, Congress passed the First Step Act, Pub. L. 115-391, 132 Stat. 5194, which, among other things, amended 18 U.S.C. § 3582(c)(1)(A) to permit a defendant, in addition to the Director of the BOP, to move for a sentence reduction.

consistent with applicable policy statements issued by the Sentencing Commission,” and (3) such a reduction is appropriate “after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent that they are applicable.” 18 U.S.C. § 3582(c)(1)(A).

Congress did not define what constitutes “extraordinary and compelling reasons” for a sentence reduction under section 3582(c)(1)(A), but rather delegated that authority to the Sentencing Commission. In 28 U.S.C. § 994(a)(2), Congress granted the Commission broad authority to promulgate “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in [18 U.S.C. § 3553(a)(2)].” And, as particularly relevant here, in 28 U.S.C. § 994(t), “Congress instructed the Commission to ‘describe what should be considered extraordinary and compelling reasons for sentence reduction [under section 3582(c)(1)(A)], including the criteria to be applied and a list of specific examples.’” *United States v. Garcia*, 655 F.3d 426, 435 (5th Cir. 2011) (quoting 28 U.S.C. § 994(t)).

The Commission’s policy statements, issued under 28 U.S.C. § 994(t), are binding concerning what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A). As the Fifth Circuit has explained, “a common sense reading” of section 3582(c)(1)(A)’s phrase that a sentence reduction must be “consistent with applicable policy statements issued by the Sentencing Commission,” is that, “regardless of whether Congress wanted [the Commission’s] policy statements to be binding in the sentencing context, it wished them to be binding in § 3582(c) proceedings.” *Id.* “If a sentence reduction is inconsistent with a policy statement, it would violate § 3582(c)’s directive, so policy statements must be binding.” *Id.*; see also *Dillon*, 560 U.S. at 827 (explaining that the Commission’s pertinent policy statements are binding on courts where 18 U.S.C. § 3582(c)(2)—using the same language as

section 3582(c)(1)(A)—permits a sentencing reduction based on a retroactive guidelines amendment only if “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission”).

Thus, Defendant cannot obtain a sentence reduction under section 3582(c)(1)(A) merely by asserting reasons that he, or for that matter this Court, might believe are sufficiently “extraordinary and compelling” to justify a sentence reduction. Instead, under the plain text of 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994(t), as well as controlling precedent, Defendant’s proffered reasons must be consistent with the Sentencing Commission’s applicable policy statement concerning what should be considered extraordinary and compelling reasons for a sentence reduction under section 3582(c)(1)(A).

2. Defendant satisfies section 3582(c)(1)(A) because his alleged “extraordinary and compelling reasons” for sentence reduction are “consistent with applicable policy statements issued by the Sentencing Commission.”

Section 1B1.13 allows a sentence reduction for “extraordinary and compelling reasons” only if the reasons are “consistent with this policy statement.” U.S.S.G. § 1B1.13(1)(A), (3).³ Application note 1 to the policy statement explains that “extraordinary and compelling reasons exist under any of the circumstances set forth below,” which include only: (a) a defendant suffering from a terminal illness or other medical condition “that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover”; (b) a defendant at least 65 years old who “is experiencing a serious deterioration in physical or mental health because of the aging process” and “has served at

³ The policy statement is binding under the express terms of section 3582(c)(1)(A), and because it concerns only possible sentence reductions, not increases, it is not subject to the rule of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). See *Dillon*, 560 U.S. at 824–28 (rejecting the proposed application of *Booker* in the related context of a proceeding under section 3582(c)(2)); *United States v. Doublin*, 572 F.3d 235, 237–39 (5th Cir. 2009) (rejecting application of *Booker* to sentence reductions under 18 U.S.C. § 3582).

least 10 years or 75 percent of his or her term of imprisonment, whichever is less”; (c) a defendant who has minor children without a caregiver or with an incapacitated spouse or partner who needs the defendant to be the caregiver; or (d) “[a]s determined by the Director of the Bureau of Prisons, . . . an extraordinary and compelling reason other than, or in combination with, the [above] reasons.” *Id.*, comment. (n.1(A)–(D)).

Consistent with the application note, the BOP has issued Program Statement 5050.50 (“PS 5050.50”), which describes the BOP’s consideration of compassionate-release requests. PS 5050.50, which was amended effective January 17, 2019, following the passage of the First Step Act, sets forth in detail the BOP’s definition of circumstances that may support a request for compassionate release, limited to the same bases identified by the Commission: serious medical conditions, advanced age, and family circumstances.⁴ See PS 5050.50 ¶¶ 3–6.

Neither the Commission’s policy statement nor PS 5050.50 provide a basis for compassionate release based on Defendant’s COVID-19 concerns. Instead, the grounds for release are limited to individual circumstances involving health, age, family responsibilities, and other reasons as determined by the Director of the BOP. For this reason, courts have concluded that an inmate’s concerns about risks associated with the spread of COVID-19 are not consistent with the policy statement of the Commission as required by section 3582(c)(1)(A). See, e.g., *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (explaining that “the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP’s statutory role, and its extensive and

⁴ PS 5050.50 also requires consideration of a list of nonexclusive factors: “the defendant’s criminal and personal history, nature of his offense, disciplinary infractions, length of sentence and amount of time served, current age and age at the time of offense and sentencing, release plans, and ‘[w]hether release would minimize the severity of the offense.’” *United States v. Saldana*, 807 F. App’x 816, 819 (10th Cir. 2020) (quoting PS 5050.50 ¶ 7).

professional efforts to curtail the virus’s spread”); *United States v. Eberhart*, No. 13-CR-313-PJH-1, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020) (“General concerns about possible exposure to COVID-19 do not meet the criteria for extraordinary and compelling reasons for a reduction in sentence set forth in the Sentencing Commission’s policy statement.”).

The Government asserts that it is “reasonable to find that [Defendant’s] medical condition qualifies as “extraordinary and compelling reasons” under the articulated standard. The Court will assume for purposes of this request that Defendant has met this standard based upon his own medical conditions and turn to the section 3553(a) factors.

3. The First Step Act did not alter the substantive criteria for compassionate release under section 3582(c)(1)(A).

Following the enactment of the First Step Act, the Sentencing Commission’s policy statements have not been updated. The result has been courts across the country have been divided on the question of whether Section 1B1.12 and its application notes still apply to the “extraordinary and compelling reasons” determination under 18 U.S.C. § 3582(c)(1)(A). In Defendant’s view, following the First Step Act, the Court now has authority under section 1B1.13, application note 1(D), to determine for itself what constitutes “extraordinary and compelling reasons” to modify his sentence (Dkt. #377 at 10-11). This is not the case.

The First Step Act amended section 3582(c)(1)(A) to permit a defendant to move the district court directly for compassionate release, overriding those parts of section 1B1.13 of the Sentencing Guidelines providing that only the Director of the BOP may file such motions. *See supra* n.2. The First Step Act amendments to section 3582(c)(1)(A), however, did not change the substantive criteria that district courts must apply in making those decisions. The amendments also did not shift the authority to develop such criteria from the Sentencing Commission to the

courts.⁵ Section 1B1.13's application note 1(D) requires the Director of the BOP to determine whether an inmate has adequately demonstrated extraordinary and compelling reasons for sentence modification other than, or in combination with, the reasons described in subsections (A) through (C) of application note 1, i.e., a medical condition, age, and/or family circumstances. Defendant's argument fails to recognize the difference between the First Step Act's amendments related to the procedural requirements for seeking compassionate release in district court and the unamended substantive requirements that permit courts to grant compassionate release.

Among circuit courts, the Tenth Circuit first considered the issue when it addressed whether "post-sentencing developments in case law" might constitute an extraordinary and compelling reason under section 3582(c)(1)(A). *See United States v. Saldana*, 807 F.App'x 816, 818-20 (10th Cir. 2020). Rejecting this argument, the Tenth Circuit held "neither § 1B1.12 commentary nor BOP Program Statement 5050.50 identify post-sentencing developments in case law as an 'extraordinary and compelling reason' warranting a sentence reduction." *Id.* at 820. Consistent with *Saldana*, the Tenth Circuit has continued to look to section 1B1.13 as binding guidance to determine what constitute extraordinary and compelling reasons under Section 3582(c)(1)(A). *See United States v. Pinson*, __ F.App'x __, No. 20-6050, 20 WL 7053771, at *3 (10th Cir. Dec. 2, 2020) (acknowledging that the application notes to section 1B1.13 still contain

⁵ To the contrary, the First Step Act left unchanged two critical statutory commands vesting the Commission, not courts, with authority to set the applicable standard for "extraordinary and compelling reasons" warranting a sentence reduction: (1) any sentence reduction under section 3582(c)(1)(A) must still be "consistent with applicable policy statements issued by the Sentencing Commission"; and (2) under 28 U.S.C. § 994(t), "[t]he [Sentencing] Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of Title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples," *id.* (emphasis added).

the applicable policy statement governing compassionate-release motions); *United States v. Sears*, ___ F.App'x ___, No. 20-3129, 2020 WL 7090503, at *2 n.3 (10th Cir. Dec 5, 2020) (same).

Other courts, including this Court, have reached the same conclusion as the *Saldana* court; i.e., while the First Step Act expanded prisoners' access to the courts to file compassionate-release motions under section 3582(c)(1)(A), it did not alter the substantive standards governing these motions. *See, e.g.*, *United States v. Dodd*, 471 F.Supp.3d 750, 757–58 (E.D. Tex. 2020) (“The fact that Congress's change to section 3582's procedural mechanism necessarily overrides a Sentencing Commission policy statement concerning the same procedural mechanism cannot be translated into congressional intent to alter the statute's provisions governing the merits of compassionate-release motions.”); *United States v. Lynn*, No. 89-72, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) (explaining that “there is no ... inherent incompatibility between a statute allowing defendants to move for compassionate release and a policy statement allowing BOP a role in determining whether compassionate release is warranted, and thus no basis for deeming the policy statement [in section 1B1.13] overridden”); *United States v. Ebbers*, 432 F.Supp.3d 421, 427 (S.D.N.Y. 2020) (“Congress in fact only expanded access to the courts; it did not change the standard.”).

Although the Fifth Circuit has not addressed this issue in a published opinion, it has recently issued at least one decision that, consistent with *Saldana*, treated section 1B1.13 as the Sentencing Commission's “applicable” policy statement for a section 3582(c)(1)(A) motion. *See generally United States v. Bell*, 823 F.App'x 283 (5th Cir. 2020) (per curiam). In *Bell*, the defendant sought to appeal the denial of his compassionate-release motion under 18 U.S.C. § 3582(c)(1)(A) on the grounds that his sentence was “unduly long and [that] his guilty plea was not knowing and voluntary.” *Id.* at 284. The Fifth Circuit dismissed the appeal as frivolous because

the defendant's stated grounds for release were not any of the grounds contained in the commentary to section 1B1.13, and, therefore, the stated grounds were inconsistent with the policy statements of the Sentencing Commission as required by the statute. *Id.* While the court did not address the issue of whether the First Step Act changed the binding nature of the sentencing guidelines, section 1B1.13 must be binding because the defendant's attempt to depart from the guidelines would not have been deemed frivolous otherwise. *See also United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020) (discussing the First Step Act's procedural changes to section 3582(c)(1)(A) and affirming the district court's denial of compassionate release, which applied section 1B1.13's policy statement describing when extraordinary and compelling reasons exist for the purpose of sentence modification).

The Court notes, however, that several circuits, beginning with the Second Circuit, have reached a different conclusion. In *United States v. Brooker*, 976 F.3d 228 (2nd Cir. 2020), the Second Circuit held, because the First Step Act allows both inmates and the BOP to file compassionate-release motions under Ssction 3582(c)(1)(A), section 1B1.13 now applies only when such motions are made by the BOP and is inapplicable when a compassionate-release motion is made by a defendant. *Id.* at 235–36. The Fourth, Sixth, and Seventh Circuits have agreed, largely or entirely, with the Second Circuit's conclusion. *See United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020) (holding that “[a] sentence reduction brought about by motion of a defendant, rather than the BOP, is not a reduction ‘under this policy statement,’” i.e., under section 1B1.13, and therefore section 1B1.13 is not “applicable” to such motions); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (agreeing with Brooker and holding that there is no “applicable” policy statement for section 3582(c)(1)(A) motions after the First Step Act); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020) (agreeing with Brooker and holding, “[u]ntil the Sentencing

Commission updates § 1B1.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an ‘extraordinary and compelling’ reason justifies compassionate release when an imprisoned person files a § 3582(c)(1)(A) motion”).

This Court remains persuaded that section 1B1.13’s substantive provisions apply to Section 3582(c)(1)(A) motions. The Court’s conclusion is driven by the fact that, through the First Step Act, Congress amended procedural provisions of section 3582(c)(1)(A), but left unamended the substantive criteria applicable to section 3582(c)(1)(A) motions. *See United States v. Conyers*, No. 4:12-CR-016-SDJ, 2020 WL 7480695, at *4–7 (E.D. Tex. Dec. 18, 2020). The First Step Act left unchanged two critical statutory commands vesting the Commission, not the courts, with authority to set the applicable standard for “extraordinary and compelling reasons” warranting a sentence reduction. First, any sentence reduction under section 3582(c)(1)(A) must still be “consistent with applicable policy statements issued by the Sentencing Commission.” Second, “[t]he [Sentencing] Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of Title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” 28 U.S.C. 994(t) (emphasis added).

Under the circumstances, the Court cannot conclude the First Step Act’s procedural modification to section 3582(c)(1)(A), allowing inmates as well as the BOP to file compassionate-release motions, renders “inapplicable” the Commission’s policy statement on the substantive requirements governing such motions. *See Conyers*, 2020 WL 7480695, at *4–7. Section 1B1.13’s provisions concerning “extraordinary and compelling reasons” for a sentence reduction are, on their face, procedurally neutral. The Court can discern no principled reason to treat a purely procedural expansion of section 3582(c)(1)(A) as nullifying section 1B1.13’s substantive guidance

on compassionate release. There is also no reason to believe that Congress intended to effectuate, through the First Step Act, the implementation of multiple, varying standards for courts' consideration of compassionate-release motions under section 3582(c)(1)(A): one text-bound standard for BOP-filed motions and a myriad of differing standards for defendant-filed motions to be developed and applied on a case-by-case basis by district courts across the country. *See Conyers*, 2020 WL 7480695, at *4–7.

Congress decided to leave both section 3582's requirement that any reduction be consistent with the applicable policy statement and section 994's authorization and directive of the Sentencing Commission to promulgate the policy statement undisturbed. Because the language of the statutes at issue is unambiguous and provides no basis to nullify entirely or in part the application of section 1B1.13's substantive criteria to section 3582(c)(1)(A) motions, the Court concludes that section 1B1.13 provides the Sentencing Commission's "applicable" policy statement concerning the standard to be applied in evaluating whether "extraordinary and compelling reasons" support a sentence reduction. *See id.* Likewise, the Court remains bound by Fifth Circuit precedent confirming that the Sentencing Commission's policy statements are binding in section 3582(c) proceedings. *See Garcia*, 655 F.3d at 435 ("If a sentence reduction is inconsistent with a policy statement, it would violate § 3582(c)'s directive, so policy statements must be binding.").

For these reasons, the Court will adhere to the controlling text of section 3582, together with Supreme Court and Fifth Circuit precedent, confirming that any proposed sentence reduction under section 3582(c)(1)(A) must be consistent with applicable policy statements issued by the Sentencing Commission.

C. Section 3553(a) Does Not Support a Sentence Reduction.

The section 3553(a) factors do not support a reduction of Defendant's sentence. First, the Court considers the nature and circumstances of the offense and history and characteristics of the Defendant. All 38 counts charged in the underlying indictments allege deception, in one form or another, over a four-year period from around March 21, 2006, to March 8, 2010. The deception was facilitated by correspondence and filings authored or directed by Defendant, and the conduct in the second indictment took place while Defendant was on pretrial release for the first case. Defendant's scheme resulted in intended losses of more than \$20 million and actual losses of more than \$15 million to the victim banks. Defendant also has a long criminal history. Before being indicted in his federal cases, Defendant pleaded guilty to or was convicted of a host of felonies: Assault and Battery⁶, Robbery, Embezzlement and Grand Larceny, and Mail Fraud. Defendant later pleaded guilty to Obstructing an Officer, a misdemeanor. Defendant also attempted to flee in his federal case. Defendant's activities in this case and his history and complete disrespect for the law, warrant against a sentence reduction.

Second, the Court considers the need for the sentence to be imposed to reflect seriousness of the offense, promote respect for the law and punishment for the offense; to afford adequate deterrence; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. The Court finds that reducing Defendant's sentence would undermine the seriousness of his offense, respect for the law, and just punishment. His sentence was necessary to provide adequate deterrence as well as protection of the public. Defendant's offense conduct

⁶ In his reply, Defendant asserts that the PSR was in error as to his conviction for Assault and Battery and Robbery. Defendant never objected to this criminal history at the time of sentencing. Even if Defendant is correct that these convictions are errors, the result is still the same. Based upon a totality of the circumstances, Defendant is a danger to society.

demonstrates repeated instances of fraud over four years, resulting in losses intended to be more than \$20 million. From the detailed criminal history in his PSR, it appears Defendant has been in near constant contact with the criminal justice system most of his adult life. This factor weighs against a sentence reduction.

Third, the Court looks to the kinds of sentences available to the Court. Defendant has served ten years of his 30-year sentence which means that there is no other type of sentence available to Defendant other than a sentence reduction. Considering his offense conduct, this factor weighs against any reduction.

Fourth, the Court considers the kinds of sentence and range established for the applicable category of offense and the defendant. The PSR calculated a total offense level of 44, criminal history category III. The Guideline provisions recommended a Life sentence. Thus, the statutory maximum of 30 years was a favorable ceiling to Defendant's sentencing. Considering his range was higher than the statutory maximum demonstrates that this factor also weighs against a sentence reduction.

Fifth, the Court considers any pertinent policy statement. Although the Court has assumed that Defendant's medical condition qualifies as extraordinary and compelling reasons, the Court finds that the Defendant would pose a danger to society. Therefore, Defendant fails to fully meet all requirements of the policy statement.

Sixth, the Court needs to consider the need to avoid unwarranted sentence disparities among defendants. Defendant's sentence is below the Guideline range for his offense level and criminal history and he was the only defendant in his cases.

Finally, the Court considered the need to provide restitution to any victims of the offense. Defendant was ordered to pay restitution in the amount of \$13,640,425.56. Defendant, while

incarcerated, cannot pay restitution. However, based upon his conduct in this case, the Court doubts, if released, whether Defendant would ever be in a position to be able to pay restitution.

Although the Court agrees that Defendant is not currently in good health, the Court also recognizes that considering Defendant's history there is reason to doubt all of the claims being made by Defendant. After consideration of the factors in 18 U.S.C. § 3553(a) and comparing Defendant's claims about his medical condition against his medical records, a sentence reduction is not warranted.

D. Defendant's Motion Must Be Dismissed for Lack of Jurisdiction.

Because Defendant's motion for compassionate release fails to meet the requirements of section 3582(c)(1)(A), it must be dismissed for lack of jurisdiction. It is well-settled in the Fifth Circuit that 18 U.S.C. § 3582 sets out the limited instances in which a district court has jurisdiction to modify a term of imprisonment. *See, e.g., United States v. Garcia*, 606 F.3d 209, 212 n.5 (5th Cir. 2010) (per curiam) (citing *United States v. Bridges*, 116 F.3d 1110, 1112 (5th Cir. 1997)) (“The district court’s jurisdiction to correct or modify a defendant’s sentence is limited to those specific circumstances enumerated by Congress in 18 U.S.C. § 3582.”); *United States v. Marion*, 79 F. App’x 46, 2003 WL 22423180 at *1 (5th Cir. 2003) (citing *United States v. Early*, 27 F.3d 140, 142 (5th Cir. 1994)) (stating that “[s]ection 3582(c) limits sentence modification only to certain narrow circumstances, none of which are applicable in Marion’s case,” and dismissing the motion because it was “unauthorized and without a jurisdictional basis”). In a line of cases over two decades, circuit case law has repeatedly reaffirmed that section 3582 provides a limited grant of jurisdiction for a district court to modify a term of imprisonment. *See, e.g., United States v. Rene*, 785 F. App’x 240, 240–41 (5th Cir. 2019) (per curiam); *Bridges*, 116 F.3d at 1112. Because

these cases speak in terms of section 3582 as a whole, it follows that section 3582(c)(1)(A), and the limitations within, circumscribe the Court’s jurisdiction.⁷

Under the “rule of finality[,]” “[f]ederal courts are forbidden, as a general matter, to ‘modify a term of imprisonment once it has been imposed.’” *Freeman v. United States*, 564 U.S. 522, 526, 131 S.Ct. 2685, 180 L.Ed.2d 519 (2011) (citing 18 U.S.C. § 3582(c)) (plurality op.); *see also Dillon*, 560 U.S. at 819 (same). This limitation on federal courts’ power is confirmed in the text of section 3582. *See* 18 U.S.C. § 3582(c) (stating that, subject to certain exceptions, a court “may not modify a term of imprisonment once it has been imposed”). This rule of finality “is subject to a few narrow exceptions.” *Freeman*, 564 U.S. at 526. Section 3582 provides such exceptions, including an exception allowing the Director of the BOP, or a defendant who has fully exhausted all administrative rights, to move for a modification of the defendant’s imprisonment term based on the existence of “extraordinary and compelling reasons” warranting a reduction of the defendant’s sentence. *See* 18 U.S.C. § 3582(c)(1)(A)(i).⁸ A defendant must conform both to

⁷ The Court recognizes that a recent line of Supreme Court jurisprudence has clarified the distinction between “true jurisdictional conditions and nonjurisdictional limitations on causes of action.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010). However, as the Court recently explained in *United States v. Rios*, No. 4:06-CR-14-5, 2020 WL 3410639, at *2–*4 (E.D. Tex. June 11, 2020), it does not appear that this line of Supreme Court authority undermines the Fifth Circuit’s understanding of section 3582’s exceptions to the finality rule as jurisdictional conditions rather than claims-processing rules.

Further, at least six circuits have treated section 3582’s exceptions to the finality rule as jurisdictional. *See United States v. Denson*, 798 F. App’x 605, 605–06 (11th Cir. 2020) (per curiam) (citing *United States v. Phillips*, 597 F.3d 1190, 1194–97 (11th Cir. 2010)); *United States v. Carrillo*, 720 F. App’x 815, 815 (8th Cir. 2018) (per curiam) (citing *United States v. Auman*, 8 F.3d 1268, 1271 (8th Cir. 1993)); *United States v. Jordan*, 853 F.3d 1334, 1338 (10th Cir. 2017); *United States v. Spears*, 824 F.3d 908, 909 (9th Cir. 2016); *United States v. Freeman*, 659 F. App’x 94, 98 (3d Cir. 2016) (citing *United States v. Doe*, 564 F.3d 305, 309 (3d Cir. 2009)); *Garcia*, 606 F.3d at 212 n.5. On the other hand, the Court is aware of only two circuits that have reached the opposite conclusion. *See United States v. Alam*, 960 F.3d 831, 832–33 (6th Cir. 2020); *Taylor*, 778 F.3d at 669–71.

⁸ Beyond section 3582, there are additional, limited exceptions to the finality rule. For example, Federal Rule of Criminal Procedure 35(a) authorizes a district court to “correct a sentence that resulted from arithmetical, technical, or other clear error,” and Rule 35(b) authorizes a district court to “reduce a

the procedural and substantive requirements of section 3582 for a court to have jurisdiction. If the text of an applicable exception is met, section 3582 provides that the case falls within the district court's adjudicatory authority to modify the defendant's term of imprisonment. If the text of an applicable exception is not met, there is no jurisdictional basis for the court to modify the term of imprisonment given the longstanding, strict application of the finality rule.⁹

Thus, the exceptions set forth in the text of section 3582 serve to create jurisdiction to modify a defendant's term of imprisonment where no jurisdiction would otherwise exist under the finality rule.¹⁰

* * *

To determine this case, it is enough for the Court that the Fifth Circuit's binding precedent continues to treat section 3582 as a demarcation of jurisdiction. Because Defendant has failed to meet the controlling requirements for compassionate release set forth in section 3582(c)(1)(A), his motion for compassionate release must be dismissed for lack of jurisdiction.¹¹

sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”

⁹ See *United States v. Smith*, 438 F.3d 796, 799 (7th Cir. 2006) (Easterbrook, J.), overruled by *Taylor*, 778 F.3d at 671 (7th Cir. 2015) (explaining that, “[b]ecause § 3582(c) limits the substantive authority of the district court, it is a real ‘jurisdictional’ rule, rather than a case-processing requirement”).

¹⁰ The Supreme Court's decision in *Gonzalez v. Thaler*, 565 U.S. 134, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012), is analogous and instructive. In the context of a habeas petitioner's request for postconviction relief, the Court construed 28 U.S.C. § 2253, which “governs appeals in habeas corpus proceedings.” *Id.* at 140. The Court held that section 2253(c)(1) included the following “jurisdictional” language: “Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals[.]” *Id.* at 142 (internal quotation marks omitted). Although the word “jurisdiction” does not appear in the statute, the Court nonetheless affirmed that section 2253(c)(1)'s certificate-of-appealability requirement is jurisdictional. *Id.* Similarly here, section 3582's language that a court “may not modify a term of imprisonment once it has been imposed,” except as provided under subsections 3582(c)(1)–(2), speaks in jurisdictional terms.

¹¹ Defendant also requests, in the alternative, that the Court order him to home confinement (though Defendant does not specify a legal basis for such relief). Contrary to Defendant's assertion, the BOP has exclusive authority to determine where a prisoner is housed; thus, the Court is without authority to order

III. CONCLUSION

It is therefore **ORDERED** that Defendant's Motion for Release Under the First Step Act This Emergency Motion for Reduction of Sentence in accordance to Compassionate Release Pursuant to 18 U.S.C. section 3582(c)(1)(A) Resulting Because of the COVID-19 Pandemic (Dkt. 377) in Case Number 4:09cr161 is **DISMISSED for lack of jurisdiction.**

It is further **ORDERED** that Defendant's Motion for Release Under the First Step Act This Emergency Motion for Reduction of Sentence in accordance to Compassionate Release Pursuant to 18 U.S.C. section 3582(c)(1)(A) Resulting Because of the COVID-19 Pandemic (Dkt. 275 in Case Number 4:10cr47 is **DISMISSED for lack of jurisdiction.**

SIGNED this 10th day of February, 2021.



AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

home confinement. 18 U.S.C. § 3621(b); *see also United States v. Miller*, No. 2:17-CR-015-D (02), 2020 WL 2514887, at *1 (N.D. Tex. May 15, 2020) (“[N]either the CARES Act nor the First Step Act authorizes the court to release an inmate to home confinement.”).